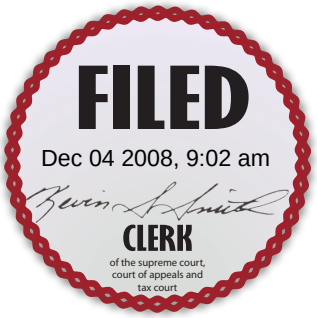

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IN THE COURT OF APPEALS OF INDIANA

TRAVIS STOUT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 57A04-0805-CR-282
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE NOBLE SUPERIOR COURT
The Honorable Robert E. Kirsch, Judge
Cause No. 57D01-0706-FD-172

December 4, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Travis Stout appeals his conviction for Intimidation[1] as a class D felony following a jury trial. Stout challenges the sufficiency of the evidence as the sole issue on appeal.

We affirm.

The facts most favorable to the conviction follow. Tracy McClellan and Stout were in a relationship that ended in May 2007. Kimberly Carpenter, Tabitha Vaught, and Wanetta Gause were all acquaintances of McClellan, all young adults. Immediately after McClellan ended the relationship with Stout, she began dating Brent Brown and moved in with Brown and his father at his father's residence in Noble County, which was across the street from the home Gause shared with her boyfriend, Michael Almack. After the break-up with McClellan, Stout immediately began dating Vaught.

On June 22, 2007, McClellan and Brown were involved in an argument, during which Brown grabbed McClellan's wrist. McClellan became scared by Brown's actions and discussed the incident with Gause, who was concerned enough to talk to Brown about what had happened. Gause also told her brother, Billy Gause, and her boyfriend (Almack) about the incident between McClellan and Brown. The information eventually relayed to Stout, Carpenter, and Vaught was that Brown was beating McClellan.

After attempts to contact McClellan about the possible physical abuse proved unsuccessful, on June 23, 2007, Stout, Vaught, Carpenter, and Kevin Stump (Carpenter's boyfriend) drove to where McClellan was living in Noble County in order to pick her up and take her back to Fort Wayne to her mother's house. During the drive to Noble County, Stout was "running his mouth" saying that he was going to beat up Brown. *Transcript* at 307.

[1] Ind. Code Ann. § 35-45-2-1 (West, Premise through 2007 1st Regular Sess.).

Given Stout's demeanor and what he was saying, there was a discussion about dropping Stout off at Wal-Mart in order to avoid further conflict when the group arrived in Noble County to confront McClellan about the alleged abuse. Stout, however, continued on the trip.

After arriving at the house where McClellan was living with Brown, McClellan, Carpenter, Vaught, Gause, Brown, and Almack stood in the front yard.[2] McClellan told Carpenter and Vaught that she did not want to go back to Fort Wayne with them. McClellan asked Carpenter and Vaught if Stout had come with them because she was afraid that if Stout had, he would "hurt Brent or do something". *Id*. at 138. Carpenter and Vaught denied that Stout was with them. While the group was still gathered, Carpenter received a phone call from Stout. McClellan asked to speak with him, and Carpenter gave her the phone. When McClellan first got on the phone with Stout, Stout described what her dog looked like, her car, and the appearance of the backyard of the house where she was living. This scared McClellan because she realized Stout was nearby. Stout then asked McClellan if she was returning to Fort Wayne, and McClellan told him "no". *Id*. at 136. Shortly thereafter, Stout told McClellan that "he had a pistol for Brent."[3] *Id*. McClellan became very upset and began crying and hyperventilating. McClellan then observed Carpenter's car pull around the corner down from the house and park three to seven houses away. A few minutes later, Stout got out of the car and started yelling. Carpenter and Vaught walked to the car and told Stout to

[2] Stout and Stump were in Carpenter's car parked in an alley behind Brown's house.

[3] Stump overheard Stout's statement to McClellan and patted him down, but did not find a gun on Stout.

get back in the car. They all then drove away. McClellan suffered a panic or asthma attack as a result of the stress she incurred due to the threat Stout made against Brown.

The following morning, the incident was reported to the Noble County police. In her written statement to police, McClellan stated that Stout told her that he "had a pistol for Brent but he wouldn't use it." *State's Exhibit 1*. At trial McClellan testified, revising her written statement, that Stout told her he would indeed use the pistol against Brown and that she interpreted Stout's statement as a threat.

On June 27, 2007, the State charged Stout with two counts of intimidation as class D felonies: Count I alleged intimidation as to Almack and Count II alleged intimidation as to Brown. On February 26, 2008, the State filed an amended information, adding two more counts of intimidation: Count III alleged intimidation as to McClellan, and Count IV alleged intimidation as to Gause.[4] A two-day jury trial commenced on March 12, 2008. The jury returned not guilty verdicts on Counts I, II, and IV, and a guilty verdict on Count III (as to McClellan). On March 27, 2008, the trial court sentenced Stout to the advisory sentence of one and one-half years, with all but six months suspended on his conviction for class D felony intimidation. The trial court ordered the sentence be served consecutively to Stout's sentence in an unrelated case. Stout now appeals.

Our standard of review for a challenge to sufficiency is well settled. When considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder's exclusive province to weigh the evidence and therefore neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). We

consider only the probative evidence and reasonable inferences supporting the verdict, and "must affirm 'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" *Id*. at 126 (*quoting Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

The crime of intimidation is defined in pertinent part as follows:

> (a) A person who communicates a threat to another person, with the intent:
> (1) that the other person engage in conduct against the other person's will; [or]
> (2) that the other person be placed in fear of retaliation for a prior lawful act; . . . . commits intimidation, a Class A misdemeanor.
> (b) However, the offense is a:
> (1) Class D felony if:
> (A) the threat is to commit a forcible felony; . . . .
> (c) "Threat" means an expression, by words or action, of an intention to:
> (1) unlawfully injure the person threatened or another person, or damage property; . . . .

I.C. § 35-45-2-1. Thus, in order to convict Stout of intimidation as charged in Count III, the State was required to prove beyond a reasonable doubt that Stout (1) communicated to McClellan (2) a threat to commit a forcible felony against Brown (3) with the intent that McClellan engage in conduct against her will or that she be placed in fear of retaliation for a prior lawful act.

Whether intimidation has occurred is a question of fact. *Ajabu v. State*, 677 N.E.2d 1035 (Ind. Ct. App. 1997). Whether a communication is a threat is an objective question for the trier of fact. *Id*. Stout argues that his statement that he "had a pistol for Brent", is too ambiguous to constitute a threat in that it is not an expression of an intention to unlawfully injure Brown. In support of his argument, Stout directs us to McClellan's written statement

[4] The facts giving rise to Counts I, II, and IV are not germane to this appeal and were therefore not set forth

in which she indicated that Stout was not going to use the weapon he claimed to have. At trial, however, McClellan unequivocally testified that her written statement was incorrect and that Stout in fact stated that he would use the pistol against Brown. The inconsistency between McClellan's written statement and trial testimony was a matter affecting McClellan's credibility, the determination of which was within the prerogative of the jury. Stout also asserts that his statement could be construed as indicating that he had a pistol to protect himself from Brown and that he had no intention of using it. Stout's alternate explanation is implausible, at best. Further, Stout's argument is simply a request that we reweigh the evidence and reassess the credibility of the witnesses, a task which we will not undertake on appeal. In any event, Stout's statement can reasonably be construed in one of two ways: (1) as indicating a desire to give the pistol as a gift to Brown (highly unlikely) or (2) as evincing an intent to shoot Brown. For reasons too obvious to explain, we find that under the circumstances, Stout's statement is indicative of the latter.

Stout also argues that his statement to McClellan was not an expression of an intent to commit a crime, let alone a forcible felony. Again, Stout is asking this court to reweigh the evidence. Given the evidence presented, a reasonable inference, in fact, the best inference, can be drawn that Stout's threat was that he would harm Brown with his claimed pistol. This meets the requirement that the expression must indicate an intent to commit a forcible felony.

Stout argues that the evidence is insufficient to establish that he communicated a threat to McClellan with the intent that she engage in conduct against her will or to place her in fear of retaliation for a prior lawful act. The State's theory as to the former was that Stout

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above.

wanted McClellan to return to Fort Wayne with him and when she refused, he threatened her to obtain her compliance. The State's theory as to the latter was that Stout's threat placed McClellan in fear of retaliation for telling Stout that she was not going to Fort Wayne with him. Again, Stout's many arguments are simply requests that we reweigh the evidence by crediting other evidence or drawing contrary inferences.

Here, it is clear that Stout wanted McClellan to return to Fort Wayne with him and when she refused, he threatened her stating that he "had a pistol for Brent". *Transcript* at 136. As a result of this threat, McClellan was scared of what Stout might do to Brown given her refusal to return to Fort Wayne with Stout. Having reviewed the record, we find sufficient evidence from which the jury could have concluded that Stout threatened to unlawfully injure Brown by using a pistol with the intent that such would persuade McClellan to return to Fort Wayne with him or put McClellan in fear of retaliation for refusing to return to Fort Wayne.

Stout's references to conflicting testimony, alternative explanations for his statement, and intimations that McClellan's only motivation was to reconcile with him are all arguments asking this court to invade the province of the jury to weigh the evidence and judge the credibility of the witnesses. We recognize that the trial court, in addressing Stout's motion for a directed verdict, referred to the evidence as "meager". *Transcript* at 408. Nevertheless, we cannot say that the jury could not have concluded that Stout was guilty of class D felony intimidation beyond a reasonable doubt.

Judgment affirmed.

DARDEN, J., and BARNES, J., concur